A/HRC/WG.16/1/CRP/1

Distr.: General
1 July 2015

English only

Human Rights Council
Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights
First session
Geneva, 6 – 10 July 2015

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The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[24 June 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.15-10976 (E)

1510976

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I. The Necessity for a Business and Human Rights Treaty

A. The Wrong Starting Point

1. In the middle of last year, the Human Rights Council passed a resolution that establishes 'an intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights'.[1] The resolution – sponsored by Ecuador and South Africa – garnered 20 votes in favour, 13 abstentions, and 14 votes against it. The voting patterns reflect (largely) a split between developed countries and developing countries as well as between more established economic powers such as the United States and European Union (which voted against) and emerging economic powers (such as China and Russia).

2. In the face of this global split, John Ruggie – the former Special Representative of the Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises – has recently issued a number of online interventions in which he focuses on the difficulties of actually achieving a binding international human rights treaty on business and fundamental rights and the flaws in the current resolution. [2] Thus far, Ruggie has essentially set the agenda for discussion with academics responding to arguments that he has provided against the treaty initiative.

3. Yet, in a certain sense, this debate commences from the wrong starting point. The first step, in my view, in engaging with a proposal for a treaty on business and human rights is to consider the reasons for it, not the difficulties associated with achieving it. Identifying the purpose and goal of such a treaty is important in outlining a vision of where we should aim at in this field as well as determining the possible content of any such instrument. In approaching this task, it is necessary to investigate some of the reasons why the current primary instrument in this field – the Guiding Principles on Business and Human Rights – does not adequately address several problems in international law. Understanding the lacunae that exist can help identify the key roles that a treaty can play. With a clear vision in mind, it then becomes possible to address the difficulties that may arise in implementing it.

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[1] Human Rights Council, 'Elaboration of an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights' A/HRC/26/L.22/Rev.1 (25 June 2014).

[2] He already made the choice not to follow this route many years back when he outlined his 'Protect, Respect and Remedy' Framework on Business and Human Rights: see, for instance, his reasoning in John Ruggie, *Business and Human Rights – Treaty Road Not Travelled* (May 1, 2008), available at http://business-humanrights.org/en/pdf-treaty-road-not-travelled. With the advent of the current debate after his mandate ended, he has taken a number of public positions which question the wisdom of pursuing a treaty: see, for instance, John Ruggie, *A UN Business and Human Rights Treaty?*, available at http://business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf; J. Ruggie, 'Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors' (9 September 2014), available at http://www.ihrb.org/commentary/quo-vadis-unsolicited-advice-business.html; his closing remarks at the Forum on Business and Human Rights and a recent online symposium available at Http://jamesgstewart.com and his piece J Ruggie 'Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights' available at http://business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty.

4. In this paper,[3] I will outline four arguments for why a treaty is necessary. The arguments all are rooted in a common normative understanding of fundamental rights and seek to ensure that they are accorded the importance they deserve in this increasingly globalized world. Whilst each argument on its own has strength and could be developed in more detail, this paper aims to emphasize the cumulative strength that the four arguments presented lend in favour of a treaty. The emphasis throughout is also upon why a binding legal instrument is particularly important for international law, as opposed to softer forms of regulation. Having outlined the case for the treaty, I then turn to some of the difficulties identified by Ruggie. I attempt to show why none of these objections provides good reason to abandon the idea of a treaty as well as why it would be unfortunate to proceed with an alternative, more restrictive proposal for a treaty that only addresses 'gross' human rights violations.

B. The Argument from Bindingness

5. The starting point for any discussion surrounding a treaty in this area must be the concern for the protection of fundamental rights which 'derive from the inherent dignity of the human person'.[4] The fact that individuals have an intrinsic worth leads to the requirement that they be afforded protection for their fundamental interests in freedom, well-being, and political participation.[5] Fundamental rights importantly are articulated from the perspective of recipience: of those who are entitled to those rights.[6] As such, the primary concern from the perspective of human rights law is that these entitlements are realised and that their interests are not abrogated. These rights are not specific about the agents that are required to realise them: what they entail are obligations on others both to desist from behaviour that would imperil these entitlements and to assist in the realisation thereof. The fact that fundamental rights discourse was initially focused upon governments does not mean that governments are the only agents upon whom obligations fall to realise these entitlements. All agents can and must bear some of the obligations flowing from these rights: it makes no sense to suggest that a company which orders a physical assault on an individual does not commit a human rights violation whereas a state which orders its police to act in such a manner does do so.[7]

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[3] This is a shortened version of a longer academic piece which is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552760.

[4] Preamble to the International Covenant on Civil and Political Rights (1966) 999 UNTS 171 and 1057 UNTS 407 available at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx; Preamble to the International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3 available at http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx. Many authors see this as the very foundation of the international system: see McDougal, Lasswell and Reisman 'The World Constitutive Process of Authoritative Decision' in M.S. McDougal and W.M. Reisman *International Law Essays: a Supplement to International Law in Contemporary Perspective* (1981) 191, at 201 who write that '[t]he fundamental goal which we postulate for the world constitute process of authoritative decision, as for all public order, is that of human dignity: the inherent and equal value of every human being'.

[5] For a philosophical justification for fundamental rights, see D. Bilchitz, *Poverty and Fundamental Rights* (2007), at 47-74.

[6] For the distinction between the perspective of recipience and the perspective of agency, see Bilchitz, *ibid*, at 74 in response to an objection by O. O'Neill, *Towards Justice and Virtue* (1996), at 134.

[7] For a more detailed version of this argument, see D Bilchitz 'A chasm between 'is' and 'ought'? A Critique of the normative foundations of the SRSG's Framework and Guiding Principles in S Deva and D Bilchitz *Human Rights Obligation of Business: Beyond the Corporate Responsibility to Respect?* (2013) 111-114.

6. The problem here can be illustrated by the case of Socio-Economic Rights Action Centre v Nigeria.[8] A complaint was brought to the African Commission on Human and People's Rights concerning the severe environmental degradation caused by irresponsible oil practices in Ogoniland, Nigeria. People in Ogoniland suffered from severe health problems and violations of their right to housing and food. The Commission found that the Nigerian state had a duty to protect its citizens against violations of their rights by private parties. In this case, 'the Nigerian government has given the green light to private actors, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis'.[9] The Commission found against Nigeria and made a number of recommendations including requesting the government to compensate the people in the area for the rights violations they were subject to.

7. There is no doubt that the government of Nigeria bore a strong responsibility for the situation that unfolded in Ogoniland. Yet, the fact that the Commission focused its attention only on the actions and obligations of the government is puzzling: the oil companies could arguably have been said to have primary responsibility for the harms caused yet the Commission never addresses their responsibilities directly. The findings are all against the state rather than the companies themselves who are consequently not required to compensate for the harms caused. The failure to recognize that businesses themselves are bound by human rights violations under international and regional instruments leads to this lacuna: that only states can be held responsible and those who, at times, primarily cause harm to fundamental rights escape without any form of accountability. Moreover, in cases where the state cannot be shown to be culpable or complicit in the harm caused, there will be no-one who will be legally responsible despite the fact that a violation of rights has occurred.

8. There is much confusion around whether businesses do in fact have obligations in relation to fundamental rights at international law (outside the domain of international criminal law), largely caused by the strong statements to the contrary issued by John Ruggie.[10] I have argued previously that the logic of international human rights law requires us to recognize that businesses already do have such obligations.[11] A key role for an international treaty would be expressly to recognize and clarify this point, namely, that businesses have legal obligations flowing from international human rights treaties and to enable actions to take place against them directly.

9. A further point is also highlighted by the SERAC case. The remedies provided by the Commission are all directed at the government of Nigeria and not at the corporations. This makes sense given that the Commission did not engage with the question as to whether the businesses concerned had any obligations in relation to fundamental rights. This highlights the important connection between the recognition of binding obligations and the right to have access to a remedy.[12] Without an understanding of the obligations corporations bear with respect to fundamental rights, it will not be possible for victims of rights violations to claim access to a remedy against such a private corporation. This is perhaps one of the strange features of the Guiding Principles on Business and Human Rights: whilst recognizing the central pillar that victims of rights violations should be able to have access to a legal remedy, they do not expressly recognize binding legal obligations for violations

[8] Communication 155/96, African Commission on Human and Peoples' Rights (2001) AHRLR 60.

[9] Ibid. para. 58.

[10] See, for instance, Commission on Human Rights 'Interim Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises', E/CN.4/2006/97 (222 February 2006), para 60.

[11] Bilchitz, *supra* note 7, 111-114.

[12] I am indebted to Meghan Finn for highlighting this point to me.

of fundamental rights. Access to a remedy is itself a fundamental right in international law[13] but how can a remedy be provided without a recognition of a prior obligation? The role of a treaty in expressly recognizing that businesses have legally binding human rights obligations thus becomes crucial for ensuring legal remedies are provided to individuals.

C. The Argument from Norm Development

10. Even once we recognize that corporations have certain legal obligations in relation to fundamental rights, many questions remain concerning the exact nature and extent of these obligations. This problem flows from the fact that fundamental rights themselves provide entitlements but do not specify exactly what any particular agent must do. The primary focus must be on the realization of these rights: who exactly must do so and what they are required to do requires further specification. In specifying the exact obligations of business in relation to fundamental rights, there is a need for much development both at the international and national levels.

11. Interestingly, the Guiding Principles on Business and Human Rights do not adequately address this difficult question. Corporations generally have a responsibility to respect human rights – '[t]his means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[14] As both international, regional and domestic institutions and courts recognize, the mere infringement of a fundamental right is not sufficient to determine that a wrong has been done: a further step is necessary, namely, determining whether the infringement lacks a strong justification which can be said to be proportional to the benefits sought to be achieved.[15] Moreover, in relation to corporations, there is also a prior question, namely, whether the infringement of rights flows from an obligation that falls upon or applies to a corporation.[16] Both questions are elided by a simple focus on a 'responsibility to respect fundamental rights'.

12. Consider a company policy that provides that it has a right to gain access to all information that flows through the laptops it provides to employees or its computer network. The company reasons that the laptops and network are its property and, hence, it may behave in this manner. Employees are unhappy with the policy claiming that it violates their right to privacy. Two sets of issues arise in this context. The first concerns whether corporations are bound by the right to privacy and, if so, what their obligations are in this regard. [17] It is not clear whether a company has any obligation to avoid such a policy until it is determined that such a policy restricts the right in a manner that infringes upon the company's obligations.

13. Even if it is determined that the there is a prima facie violation of the right to privacy of employees in this instance, that does not end the matter. The question then arises as to whether there is any legitimate justification for the infringement in this scenario. A

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[13] Article 2 of the International Covenant on Civil and Political Rights, *supra* note 4.

[14] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (A/HRC/17/31), at principle 11, available, with commentary, at http://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_en.pdf.

[15] See, for example, Canadian jurisprudence in *R. v. Oakes* [1986] 1 S.C.R. 103 and, in a South African context, *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391, at paras 100 ff.

[16] Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' 111 *Yale Law Journal* (2001), at 443 provides a sophisticated approach to this question.

[17] See, for instance, the South African Constitutional Court in *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401.

company, for instance, may be concerned that their networks will be used for illegal purposes such as downloading child pornography. It may also have a legitimate expectation that it may monitor the work performed by employees. If there is a justifiable reason for the infringement, it would then have to be determined whether the benefits of the infringing measure are proportional to the harms caused to fundamental rights.[18] That would involve, for instance, evaluating the necessity of the particular intervention and whether the purpose could be achieved in a way that would have a lesser impact on the privacy rights of employees (by, for instance, requiring prior notification of surveillance and taking clear measures to limit company access to work-related folders of employees).[19]

14. This example raises the fact that the application of existing rights to companies is a complex matter and will require the development of a jurisprudence which considers a number of issues: (i) the application of particular rights to corporations; (ii) the interpretation and meaning of the obligations imposed by particular rights upon corporations; and (iii) the determination of when corporations may justifiably limit fundamental rights.

15. The example above also raises the question of determining the application and limitation of fundamental rights in relation to a negative obligation that corporations may have not to harm fundamental rights. A further and related question concerns the nature and extent of the positive obligations corporations have for the realization of fundamental rights. The UN Guiding Principles focus on the responsibility to respect, which generally involves negative obligations to avoid harming fundamental rights and positive acts that flow from such obligations. [20] Several scholars have argued previously that there are good reasons why corporations should indeed be recognized as having positive obligations in relation to fundamental rights.[21] Clearly, corporations can be powerful change agents in the quest for improving global realization of fundamental rights; at the same time, it is clear that significant questions arise in determining the nature and scope of such obligations so as not to elide the distinctive nature of business entities for which profit must remain a significant motivation.

16. All these questions about the exact nature and extent of the obligations corporations have in relation to fundamental rights motivate for a mechanism that can develop international law in this regard. One of the prime functions that a treaty could perform would be to provide such a mechanism for the development of international standards surrounding business and human rights. If we look to other international human rights treaties, we see that they establish committees who perform similar tasks. The International Covenant on Civil and Political Rights, for instance, establishes a Human Rights Committee which is required to consider reports by states but also 'such general comments

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[18] See, for example the approach to these matters adopted in *R. v. Big M Drug Mart Ltd* [1985] 1 S.C.R.295; and *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785, paras 86-88.

[19] For an examination of the necessity enquiry in proportionality, see David Bilchitz 'Exploring the Necessity Enquiry in the Limitation of Fundamental Rights', in L Lazarus,C McCrudden and N Bowles(eds.) *Reasoning Rights* (Oxford: Hart, 2014) 41-627

[20] See, for example, instances in the 2008 Framework in relation to anti-discrimination, at para 55 and, in relation to due diligence, at para 56.

[21] Bilchitz, *supra* note 7; Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' 125 *Theoria* (2010), at 1; Hsieh, 'The Obligations of Transnational Corporations: Rawlsian Justice and the Duty of Assistance' *Business Ethics Quarterly* (2004), at 14. Iris Marion Young 'Responsibility and Global Justice: a Social Connection Model' (2006) *Social Philosophy and Policy* 127-130; Florian Wettstein *Multi-National Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Organisation* (2009) 285.

as it may consider appropriate'.[22] These various bodies have employed the General Comments to provide clarification, development and persuasive interpretations of the obligations imposed in the covenants. There would be a need to develop a similar mechanism in any treaty on business and human rights that could issue General Comments and thus assist in the application of international human rights to companies.

17. Such a treaty and international body would not only be of importance to the development of international human rights law but could also help influence the development of these norms at a national level too. The express recognition that corporations are themselves legally bound by fundamental rights norms and that they have particular obligations could itself have an important effect on the manner in which corporate obligations are interpreted at a national level. Indeed, many constitutions allow for the direct application of international law[23] whilst others require that it be used as an interpretive aid in national systems.[24] As such, the clarification and progressive development of international law in this area could help develop the law in domestic jurisdictions and, at least, be considered persuasive authority at a national level.

D. The Argument from Competing Obligations

18. The need for a recognition of binding obligations on corporations in respect of human rights and an understanding of the nature and extent of these obligations becomes all the more important when we consider developments in international law relating to international trade and investment. International trade regimes and bilateral and multilateral investment treaties are all enacted through binding legal frameworks and provide adjudicatory mechanisms to address disputes.

19. These fields of law have the potential to raise concerns relating to fundamental rights. In relation to WTO law, for instance, a major dispute arose concerning the patent protections provided to pharmaceutical companies and whether these could be used to prevent governments from providing life-saving medication to their people.[25] These legal regimes have, however, often developed in a manner that is quite separate from human rights law. What matters in this context is the fact that there are potential conflicts that can arise between these regimes and the demands of human rights law.

20. As we have seen, a key important role for a treaty on business and human rights would be the express recognition by states that businesses have legal obligations in relation to fundamental rights. In this context, that would involve the recognition that fundamental

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[22] Article 40(4).

[23] See, for example, a discussion of trends of monism in Africa in Killander and Adjolohoun, 'International Law and Domestic Human Rights Litigation in Africa: An Introduction' in M. Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa* (2010); and, in Latin American countries, see, for instance, Courtis, 'Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples' 10 *International Journal on Human Rights* (2009), at 53ff.

[24] Section 39(1)(b) of the South African Constitution requires that courts must consider international law when in interpreting the Bill of Rights.

[25] See for instance Choudhury et al, 'A Call for a WTO Ministerial Decision on Trade and Human Rights' in T. Cottier and P. Delimatsis (eds), *The Prospects of International Trade Regulation* (2011), at 323ff. Rights violations which have flowed from the WTO are detailed by Choudhury et al from 330 and include public services, including the rights to education and water. See also Cullet, 'Patents and Medicines: The Relationship between TRIPS and the Human Right to Health' 79 (1) *International Affairs* (2003), at 139 and, generally, H. Hestermeyer, *Human Rights and the WTO* (2008).

rights impose a similar (if not greater) level of legal bindingness as do obligations in relation to commercial regimes.[26] This would enable the recognition that the human rights obligations could well conflict with commercial treaty obligations in international law. As such, this might require dispute resolution mechanisms to address how to balance the commercial interests at play against the equally weighty fundamental rights obligations that arise in a specific context. At present, with no clarity as to the legal obligations of corporations in international law, and with most statements of responsibility existing in instruments that are at best soft-law (such as the Guiding Principles)[27], commercial obligations will be likely to trump those flowing from fundamental rights in most cases. Further analysis is necessary as to how international trade and investment treaties intersect with human rights law and how conflicts can be addressed[28]: the important point here is that a treaty could help ensure that human rights obligations of business should have at least equal status as their commercial international law obligations.

E. The Argument from Access to Remedies

21. A key concern in the field of business and human rights is the ability to gain access to remedies for victims of human rights violations by companies. It is important to recognize that three related legal doctrines create particular problems in ensuring access to remedies where multi-national corporations are concerned. First, we have what we might term the jurisdictional challenge: in international law, each state is generally regarded as sovereign with jurisdiction over its own internal affairs.[29] If we have a corporation that has subsidiaries across multiple borders, and it fails to meets its human rights obligations in several jurisdictions, the question arises whether one may found jurisdiction in one particular jurisdiction or whether one is only able to claim access to a remedy where the harm was caused.

22. Secondly, there is the problem of weak governance zones: there are parts of the world in which laws are not properly enforced and courts lack independence. How can one ensure that individuals can gain access to a remedy against corporations that violate fundamental rights in these contexts? Finally, there is the problem of the corporate structure itself: where businesses operate as companies, they are generally treated as separate legal persons with limited liability.[30] There is in fact no one entity known as a multi-national corporation: rather, there are multiple separate corporations each constituted in different countries. How does one hold the main corporate structure (or actors therein) accountable for its failure to meet its human rights obligations where it is divided into distinct legal

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[26] There is an interesting and controversial question about the extent to which there is a hierarchy of norms in international law: see, for example, Shelton, 'Normative Hierarchy in International Law' 100 (2) *The American Journal of International Law* (2006) 291; Koskenniemi, 'Hierarchy in International Law: A Sketch' 8 *European Journal of International Law* (1997) 566 and E. de Wet and J. Vidmar, *Hierarchy in International Law: The Place of Human Rights* (2012). Fundamental rights would be key candidates for norms that have a superior status given their rootedness in the dignity of individuals and the central role they have been given in the international legal system. Indeed, as a matter of normative philosophy, they *should* have this status. Yet, as international law develops and becomes more complex, there is no clarity as to whether fundamental rights are recognized to have this prior status and how they intersect with other bodies of international law.

[27] J Nolan, 'The Corporate Responsibility to Respect Rights: Soft Law or Not Law?' in Deva and Bilchitz, *supra* note 7, 138.

[28] I attempt briefly to address this in the longer version of this paper.

[29] Article 2, United Nations Charter (1945) 1 UNTS XVI.

[30] Muchlinski, 'Limited Liability and Multinational Enterprises: A Case for Reform?' 34 (5) *Cambridge Journal of Economics* (2010), at 915.

entities across national borders? The problem goes even further than this. MNCs operate today often not only through setting up subsidiaries in different countries but also through sub-contracting many activities to completely distinct corporations: major clothing brands, for instance, outsource the manufacture of clothing to a range of different entities in South-east Asia which often then sub-contract further. There is great difficulty in holding an MNC legally to account for violations of rights perpetrated by sub-contractors far removed from it, particularly where the centre of control of the MNC exists in a different state. MNCs may also use devices of corporate law such as changing their name to avoid accountability.[31]

23. These worries come together to create a major problem for victims of corporate rights violations in a case such as the following. Consider where a corporation creates major environmental damage in a country with weak governance such as the Democratic Republic of Congo (DRC). The corporation is connected to many others with a similar name and the head office is commonly understood to be in the United States. The corporation in the United States claims it is a separate legal person from the corporation in the DRC. An action therefore only lies in the DRC; but, victims of this environmental damage recognize that the failure of the court system will entail they cannot gain any compensation for the harms caused in local DRC courts. The structure of international law (based upon state sovereignty) and corporate law (which recognizes the notion of separate legal personality) creates these problems for accountability (which I term the accountability gap).

24. To address these problems faced by the people in the DRC, several interventions are necessary which could be accomplished by a treaty.[32] One of the most important concerns the forum for accountability for which two primary options seem available. [33] The first would be to try to hold the company liable for the damage caused in a country with a stronger, independent court system (often referred to as the 'home state') such as the United States in this instance.[34] This approach has been of great importance until recently where an old United States statute – the Alien Tort Claims Act (the ATCA) – was used as a basis to found jurisdiction against corporations with a presence in the United States for tortious claims where the harm was committed in other countries. Several of these cases settled, providing some compensation for the victims.[35]

25. Unfortunately, last year, in the judgment of *Kiobel v Royal Dutch Petroleum*[36], the United States Supreme Court fundamentally narrowed the scope of any potential actions

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[31] This is precisely one of the problems with holding Texaco responsible for the environmental damage it caused in Ecuador as it merged with Chevron: see Tineke Lambooy, Aikaterini Argyrou and Mary Varner 'An analysis and practical application of the Guiding Principles on providing remedies with special reference to case studies related to oil companies' in Deva and Bilchitz *supra* note 7 at 337. This partially explains the reason why Ecuador is driving the treaty initiative.

[32] The reform of a number of doctrines of corporate law are amongst these, a matter I cannot consider here in any detail.

[33] See also International Commission of Jurists, *Needs and Options for a New International Instrument in the Field of Business and Human Rights* (2014), at 9, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelecvers.compressed.pdf).

[34] Deva, 'Acting Extraterritorially to tame multinational corporations for human rights violations: Who should 'Bell the Cat'?' 5 *Melbourne Journal of International Law* (2004), at 37.

[35] See, for example, the case of *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir.) 2000; Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992). Settled Sept. 13, 1996 as well as other victories discussed at http://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/.

[36] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

under the ATCA. Moreover, very few countries, have laws similar to ATCA and, where they do, few actions have been successful.[37] A global campaign for countries to adopt laws similar to ATCA would likely face several problems. The first is a collective action problem: any state that passes these laws individually will be a less desirable destination for investment for some multi-national corporations.[38] Thus, individual states alone will have little incentive to pass such a law unless there is some collective agreement to do so. Secondly, there will no doubt remain difficulties in ensuring that such transnational claims are successful: clearly, for instance, there is greater complexity in ensuring adequate evidence is provided in a different jurisdiction.[39]

26. An international treaty would be an important development in attempting to address some of the problems that victims face in gaining access to a remedy for human rights violations. Two alternative routes exist which could be taken in such a treaty.[40] The first is a model which could be drawn from the United Nations Convention against Corruption (UNCAC).[41] This convention is based upon the approach whereby states commit themselves to enacting the relevant laws to ensure successful prosecution for corrupt offences even outside their territories.[42] They also commit to working together in investigations and technical matters to ensure successful prosecutions.[43] Such an approach would help address the collective action problem – in that all states would commit to passing such laws with extra-territorial effect – and also assist with the technical difficulties that arise with extra-territorial jurisdiction being exercised – through provisions that encourage co-operation. Similarly, the International Law Association has released the Sofia Guidelines on International Civil Litigation and the Interests of the Public which attempts to suggest rules to assist in closing the accountability gap.[44] An international treaty on business and human rights could help codify such rules.

27. The main alternative possibility to close the accountability gap would be to create an international mechanism or court which could adjudicate on civil and/or criminal claims against corporations where they have violated fundamental rights. Such a mechanism would thus be an international forum that could hold jurisdiction over corporations that operate in multiple jurisdictions and/or where the judicial system is not operating effectively. Developing such a mechanism would seriously help reduce the accountability gap in the world: it would be a less unwieldy solution to the problem than the home state

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[37] *Akpan and Milieudefensie v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria* [2013] District Court of the Hague C/09/337050/HaZA 09-1580 available at http://www.menschenrechte.uzh.ch/entscheide-1/Friday_Alfred.pdf.

[38] Deva, *supra* note 34, gives an example of a proposed Australian Bill which allowed extraterritorial jurisdiction and which was objected to by the relevant parliamentary committee on the grounds, amongst others, that it would put Australian companies at a disadvantage in the global marketplace.

[39] See S. Joseph, *Corporations and Transnational Human Rights Litigation* (2004).

[40] See also International Commission of Jurists, *Needs and Options for a New International Instrument in the Field of Business and Human Rights* (2014), at 9, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/NeedsandOptionsinternationalinst_ICJReportFinalelecvers.compressed.pdf).

[41] (2003) A/58/422. For a discussion of some lessons for a treaty on business and human rights from the process involved in passing the Convention Against Corruption, see Ramasatary, 'Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement' in Deva and Bilchitz, *supra* note 7, at 162.

[42] *Ibid*, at articles 5, 27, 38 and 42.

[43] *Ibid*, at article 43.

[44] Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations, adopted at the 75th Conference of the Association held in Sofia, Bulgaria in August 2012, available at http://www.ila-hq.org/en/committees/index.cfm/cid/1021.

liability solution which would require laws to be passed in every country that would inevitably vary in their content and effect. Such a mechanism would thus provide a forum to give effect to the right to have access to a remedy in a globalized world. It need not, however, be considered the exclusive forum in which such matters could be resolved and local courts could still play an important role in this regard. Moreover, it would assist in the process of norm development discussed above as particular cases brought before it would help develop our understanding of the application of fundamental rights to corporations.[45]

F. Response to Objections

28. I have thus far considered four arguments for why a business and human rights treaty would address serious problems in international law that have arisen with the growth and power of business in a global economic environment. In light of these arguments, it is now useful to turn to some of the objections lodged by John Ruggie against an overarching treaty and attempt to evaluate whether they negate or call into questions any of the arguments already provided in its favour.

1. Scope of the Proposed Treaty

29. The Human Rights Council resolution that has initiated discussions around the proposed treaty focuses on regulating in 'international human rights law, the activities of transnational corporations and other business enterprises'.[46] In a footnote, 'other business enterprises' are defined as 'all business enterprises that have a transnational character in their operational activities and does not apply to local businesses registered in terms of relevant domestic law'.[47] Ruggie raises the question of the scope of any business and human rights treaty and criticises the resolution for restricting its focus only to transnational corporations. He also criticises the definition of 'other business enterprises' which he claims renders the term redundant and 'purely rhetorical'.[48] The claim is that this is deeply problematic from a substantive point of view for several reasons: it would cover 'international brands and retailers that sourced apparel products from local suppliers in Rana Plaza…but not the factories in which some 1200 workers died'.[49] A related point is that it creates an artificial division between transnational and national firms which fails to capture the complex contractual and other relationships that exist in the global business world today.[50] That in turn will 'inevitably result in lawyers advising enterprises how to bypass the given definitional contours'[51] which focus only on a particular sub-set of corporate entities.

30. These arguments aim to show that a treaty which does not apply to both local and global business enterprises will thus fail adequately to protect the very fundamental rights that are at its core mission. As I have argued throughout this paper, the effective defence of fundamental rights and the interests they protect must be at the heart of any new treaty in

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[45] A proposal for such a forum has recently been put forward: for more details, see the proposal for an international tribunal put forward by Lawyers for Better Business, available at http://www.l4bb.org/news/tribunal.pdf.

[46] *Supra* note 1, at 1.

[47] *Ibid*, at fn 1.

[48] Ruggie, *supra* note 2.

[49] John Ruggie *Closing Plenary Remarks, UN Forum Business and Human Rights* available at http://jamesgstewart.com/closing-plenary-remarks-un-forum-on-business-and-human-rights/

[50] Ibid.

[51] Surya Deva *Corporate Human Rights Abuses and International Law: Brief Comments* available at http://jamesgstewart.com/corporate-human-rights-abuses-and-international-law-brief-comments/

this field. The logic of fundamental rights requires us to recognise obligations on all agents who can affect those interests: it thus does not distinguish between transnational corporations and local corporations. All corporations must therefore – from a principled point of view – be included within the scope of obligations flowing from fundamental rights.

31. At the same time, it is important to consider whether there are good reasons why there might be some reason for international law to devote specific attention to transnational corporations. The arguments in favour of the treaty demonstrate a number of the most pressing reasons for international law-making does arise from lacunae that exist in relation to the activities of transnational corporations. Consider the fact that it is transnational corporations that are best able to exploit the weaknesses of the current international legal system – detailed above in the argument around access to remedies - to avoid accountability for violations of fundamental rights in weak governance zones; and it is these entities which employ arbitration procedures against particular governments where bilateral or multi-lateral investment treaties are signed that often fail to take account of fundamental rights. The international system creates the very conditions in which such entities become viable and hence it must ensure that there is effective regulation of them. As such, there is a principled case for why states should seek to find a treaty-based solution to the problems caused by the very structure of international law itself for the regulation of corporations whose activities cross territorial boundaries.

32. The passing of a treaty in relation to transnational corporations may well also not be as restrictive as some of the criticism suggests. After all, Ruggie himself recognises that 'a growing number of local companies conduct business across borders, and thus may be said to have a transnational character'.[52] He also states that the current web of contracts formed by transnational corporations may render it difficult to draw legal boundaries around such an entity.[53] These points suggest that a wide range of local businesses could well be understood to be included within a treaty focusing on corporations with a transnational character and much will depend upon how this transnational character is defined and other legal elements of such a treaty dealing with supply chains and subsidiaries. A treaty focused on transnational corporations would also break down the conceptual and normative barriers against holding such an entity to account for violations of its obligations in relation to fundamental rights. A key benefit of a treaty would be the influence international law could have on the domestic realm and it does not strain credulity to suggest that once corporate entities are being held to account at the international level, domestic contexts that are failing to do so currently may be persuaded to follow suit.

33. There is indeed some irony in Ruggie presenting an argument of this nature which appears to contradict some of his earlier objections against a treaty. First, one of the reasons he provides in the past for not following the treaty route was the large number of companies that any such treaty would have to regulate.[54] The focus on transnational corporations would at least be a limiting mechanism that Ruggie should be sympathetic towards in light of this concern and create some division of labour with local courts that would primarily be responsible for subsidiaries. Moreover, Ruggie has argued for international legal instruments that are 'precision tools'[55] and, arguably, this is precisely what the Human Rights Council resolution is doing: by focusing on transnational corporations, it does not seek to cover the entire business and human rights areas but addresses particularly acute governance gaps such as those created by doctrines of sovereignty, separate legal

[52] *Ibid.*
[53] Ruggie, note 2.
[54] Ruggie, Treaty Road, note 2.
[55] Ruggie, Quo Vadis, note 2.

personality and the reality of weak governance. This may not fully satisfy advocates for fundamental rights such as myself but it is entirely consistent with the approach of principled pragmatism that Ruggie advocates.

2. Scale of Proposed Treaty

34. Ruggie objects also to the fact that the proposed treaty attempts to 'establish an overarching international legal framework – a global constitution of sorts – governing transnational corporate conduct under international human rights law'.[56] The problem, Ruggie argues, is that there is a wide diversity of concerns that any such treaty must address which cannot be captured by one treaty. He writes that business and human rights 'encompasses too many complex areas of national and international law for a single treaty instrument to resolve across the full range of internationally recognised human rights'.[57] Moreover, [a]ny attempt to do would have to be pitched at such a high level of abstraction that it would be largely devoid of substance, of little practical use to real people in real places, and with high potential for generating serious backlash against any form of further international legalization in this domain'.[58]

35. It is no doubt true that the relationship between business and human rights covers a wide range of issues. This is, however, precisely why a treaty is a good idea. The proposed treaty will be meant to establish a framework and a number of principles in terms of which some of these complex issues would be resolved. It would also need to establish a mechanism for norm development and, possibly, adjudication of particular disputes. They are not meant to address every single issue that arises in this complex arena but to create the legal 'basic structure'[59] in terms of which legal matters would be resolved. In turn, this could have an impact on the domestic laws of states concerning the relationship between corporations and fundamental rights. Indeed, this is precisely the structure through which international human rights treaties in general operate: they outline broad principles and rights which are then developed by the structures that the treaties create in various general comments and country reports. A business and human rights treaty would importantly recognise the binding legal obligations fundamental rights place on business and, over time, move from this abstract recognition to the sphere of more concrete application. Such a process would indeed have important consequences for 'real people in real places'. There would also be no need to re-invent the wheel in particular areas: the treaty need not replace the excellent work done by a body such as the International Labour Organisation and could simply incorporate many of the standards already developed by such groupings.

3. The Long Term and the Short Term

36. Ruggie expresses the concern that a treaty would be a long-term project. People who are affected by businesses need some form of relief in the present and cannot wait for the vague hope that such a convention will be passed.[60] Moreover, such a treaty, he claims could distract from implementing the Guiding Principles which have already been accepted by consensus in the Human Rights Council. [61]

37. It is indeed true that a business and human rights treaty will take time to negotiate and develop. This is not a reason to avoid such a process: indeed, the development of all

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[56] Ruggie, *supra* note 2.
[57] *Ibid.*
[58] *Ibid.*
[59] This draws on a notion employed by J. Rawls, *The Law of Peoples* (2001), at 3-10.
[60] Ruggie, *supra* note 2.
[61] *Ibid.*

international law norms takes time and this objection would counsel against embarking on any ambitious process to advance international law. Two significant legal developments in recent years – the Rome Statute establishing an International Criminal Court and the edifice of international environmental law – did not appear overnight and have taken years of negotiation and deliberation.

38. Having said that, clearly, for any human rights advocate, it is critical to have an eye not only on the long-term but the short-term too. As such, it would be important to push for the development in the shorter term of approaches that develop the human rights obligations of business as far as possible and encourage the establishment and development of fora where victims of rights violations can pursue access to remedies. One of the instruments which can assist in this process is the Guiding Principles on Business and Human Rights. As a recent report produced by the International Commission of Jurists remarks, there is no need to consider a treaty process and the Guiding Principles as mutually exclusive: indeed, they can complement one another.[62] The expansion of the Guiding Principles can themselves help to create the very environment in which a treaty becomes possible and also perhaps address some matters that will not be included in a treaty. As Shelton points out, 'soft law rarely stands in isolation; instead, it is used most frequently either as a precursor to hard law or as a supplement to a hard-law instrument'.[63] Indeed, she points out that in the human rights field, non-binding declarations preceded almost all the multilateral conventions that developed. Thus, a soft instrument such as the Guiding Principles can indeed be a precursor to stronger, more binding international law in this field. If the Guiding Principles have helped enable a stronger international regime to develop, the efforts and contribution of the SRSG and his mandate will have an even greater impact on international law and help address the problems identified earlier.

4. International Politics

39. One major concern that Ruggie raises relating to a treaty is its ability to command consensus amongst a wide variety of nations.[64] As he points out, the current resolution has already been highly divisive, pitting the Global North against the Global South (although this is an imperfect account of the split). Would such an initiative be doomed to repeat the past and the failure in the 1990s of such an initiative?

40. The fact is that many significant developments in international law which are widely recognised as binding today commenced with significant disagreement amongst nations. The concept of jus cogens (a peremptory norm of international law), for instance, is widely accepted today yet divided the Vienna Conference on the Law of Treaties.[65] Huge division often characterised the development of international environmental law measures: a good example is the Montreal Protocol on Substances that Deplete the Ozone Layer (a protocol to the Vienna Convention for the Protection of the Ozone Layer) which addresses ozone depletion by limiting the use and dispersion of certain harmful substances. The Protocol began with significant division between participating countries but is today regarded as a success. [66] Additional Protocol II to the Geneva Conventions,[67] the birth of the World Trade

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[62] International Commission of Jurists, *supra* note 33, at 9.

[63] Shelton, *supra* note 26, at 320-321.

[64] Ruggie, *supra* note 2.

[65] Shelton, *supra* note 26, at 300.

[66] See DeSombre, 'The Experience of the Montreal Protocol: Particularly Remarkable, and Remarkably Particular' 19 *Journal or Environmental Law* (2000) 49.

[67] For a description of the division in the negotiation process see Junod, 'Additional Protocol II: History and Scope' 33 *The American University Law Review* (1983) 29.

Organization and the Marrakesh Agreement[68] and the development of the International Criminal Court[69] were all rooted in significant disagreement between countries. Over time, greater consensus has been built around these developments; in other cases, objections have weakened in force and become less relevant given the general acceptance by most countries of the world of these agreements.

41. The manner in which developments in international law occur thus suggest that the same may hold true in the field of business and human rights: simply put, a new consensus needs to be found. The fact that such a consensus on a binding treaty does not already exist is no reason to suggest it never will exist. Already, shifts have occurred with the acceptance of the Guiding Principles at the Human Rights Council. Moreover, incentives can be created whereby states acting in their own self-interest would increasingly be encouraged to adhere to such a document.

42. It may be true that initially many developed countries will not sign on to such a document. Such a position would largely be expedient and be designed to protect the commercial interests of corporations in these countries without regard to their human impact. If this is so, over time, it will be possible to develop a strong campaign and democratic support for shifting the government policies in this regard. Examples such as Bhopal and the Rana Plaza no doubt shock most people in many of these developed countries and it would be the role of civil society organisations to ensure that this translates into support for such a treaty.

43. The world is also changing with the economic power of the BRICS countries (Brazil, Russia, India, China and South Africa) rivalling that of the traditional developed countries. Should BRICS (and other developing countries) come out strongly in favour of such a treaty, it will at least be distinctly embarrassing for developed countries such as the United States and those in the European Union to oppose it. Moreover, if such countries actively embrace such a treaty and require corporations operating therein to adhere to its provisions, this will no doubt de facto become the standard that companies utilise when evaluating their own conduct. In time, the failure of developed countries to embrace such a treaty will be less relevant as its provisions become the de facto international standard applicable to corporations (and thus potentially enter into customary international law).

44. These are all potential avenues that may play out in the future. The point is that a failure of political will currently in some quarters should not inhibit efforts to achieve a legal regime that addresses the real problems faced by international law that have been identified in this paper.

5. A Treaty on Gross Human Rights Violations?

45. An alternative to a general framework treaty on business and human rights has been proposed by John Ruggie that he claims has a narrower scope and is likely to achieve consensus at the international level. The idea he proposes is to negotiate a treaty to address 'business involvement in gross human rights abuses, such as genocide, extrajudicial killings, and slavery as well as forced and bonded labour'.[70] He contends such a focus is apposite due to the severity of the abuses involved; the consensus amongst states about these prohibitions but the existence of 'considerable confusion about how they should be

[68] Bhandari, 'Doha Round Negotiations: Problems, Potential Outcomes and Possible Implications' 4 (2) *Trade, Law and Development* (2012), at 356.

[69] Benedetti and Washburn, 'Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference' 5(1) *Global Governance* (1999) 1.

[70] Ruggie, Quo Vadis, note 2, fn 17.

implemented in practice when it comes to legal persons';[71] and that this could heighten corporate awareness of business and human rights issues more generally and have positive knock-on effects.[72]

46. The argument for such a limited treaty is based on a gradualist approach again founded in what is regarded as politically feasible and particularly egregious.[73] No doubt, such a treaty would have some merit. There are several problems, however, with focusing the efforts of states and civil society on such a limited treaty. The first is the opposite of the objection to the framework treaty and that is its highly restricted scope. The notion of 'gross' human rights abuses is designed to focus upon a very narrow sub-set of extreme violations of rights that are usually taken to constitute international crimes: as Deva points out, such a treaty would 'mostly serve a symbolic purpose for its ambit will exclude most of the human rights abuses' committed by business.[74] The narrow definition of these crimes would likely exclude very egregious violations of human rights such as the Rana Plaza building collapse and the the Bhopal gas disaster.[75] It would also – in all likelihood – exclude violations of economic, social and cultural rights where much of the abuse suffered by those in the Global South occurs and where much potential for the contribution of business lies.[76] Is it worth creating a treaty for such a narrow band of crimes alone that fails to address large areas where business has an impact on fundamental rights?

47. Moreover, much of what such a narrow treaty would cover could be addressed by amending the Rome Statute of the International Criminal Court to allow prosecutions against corporations for international crimes. A debate on such a possibility has occurred since the inception of the Rome Statute: whilst it has not been resolved in favour of allowing such prosecutions, it is unclear that a new treaty with the scope proposed by Ruggie would accomplish much more than this and not be an unnecessary duplication.[77]

48. Additionally, and perhaps this is key, such a limited treaty would fail to address some of the key arguments for establishing an international instrument on business and human rights in the first place which have been canvassed in section II of this article. First, in terms of norm development, such a treaty would have very a limited use and not affect, in any general manner, the way in which the obligations of business are understood on a day-to-day level.[78] Creating a broad framework treaty that creates the possibility of general comments and particular case law would allow for a much wider impact on the understanding of the obligations of business in this area. Secondly, such a treaty would fail in any general way to create express binding obligations upon corporations relating to fundamental rights with the same status as commercial legal obligations that could be

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[71] Ruggie, *Closing Plenary Remarks*, note 2

[72] Ibid. James Stewart canvasses some other possible reasons for such an instrument (some of which do not support the restricted focus alone on 'gross' human rights violations) in *A New Instrument on "Gross" Violations? Enthusiasm and Apprehension* available at http://jamesgstewart.com/a-new-instrument-on-corporate-responsibility-for-gross-human-rights-violations-enthusiasm-and-apprehension/

[73] See, for instance, Jenny Martinez *A First Step Is Better Than No Step at All* available at http://jamesgstewart.com/a-first-step-is-better-than-no-step-at-all/

[74] Deva, note 51.

[75] Ibid.

[76] Ibid and Stewart, note 72.

[77] Andrew Clapham, 'Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 *Journal of International Criminal Justice* 899; and Doug Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion on the Courts' (2007-2008) 6 *Northwestern University School of Law* 304.

[78] See Erika George *Incorporate Rights: Making the Most of the Meantime* available at *http://jamesgstewart.com/incorporating-rights-making-the-most-of-the-meantime/*

applied in various fora. Finally, such a treaty would fail to close the accountability gap affecting transnational corporations (and thus aid in the advancement of access to remedies for victims) other than in the narrow band of cases that effectively constitute international crimes. This was always the problem with the narrowing of the ATCA jurisdiction in the Sosa case by the US Supreme court to such egregious cases[79] – the international community should not make a similar mistake.

G. Conclusion

49. I have argued in this paper that there are powerful reasons as to why the international community should take forward the resolution of the Human Rights Council in June 2014 and develop a treaty on business and human rights. Understanding the case for such an instrument makes it clear that it will not be designed to solve all the problems that arise in the business and human rights sphere and expectations of all actors engaged in the process need to be calibrated accordingly. Its importance lies in providing legal solutions to a number of troubling lacunae, ambiguities and inflexible doctrines within the current framework of international law which have a serious negative impact upon the rights of individuals affected by corporate activities. The process of debating and negotiating such a treaty can also have a number of virtuous knock-on effects in creating awareness of the problems and stimulating creative legal thinking and interventions.

50. Understanding the rationale for the treaty also helps to provide a basis for determining its eventual contours. The arguments I have provided suggest the need to establish a framework treaty[80] with, at least the following content: corporations are recognised as having obligations in relation to a range of, at least, core internationally recognised human rights; mechanisms are established such as a General comment procedure for the development of our understanding of the application of human rights norms to corporations; mechanisms are created for holding corporations to account where they violate their obligations; and key legal principles are outlined which modify existing legal doctrines of corporate and international law that contribute to impunity for those corporations violating fundamental rights. Clearly, as the process unfolds, each of these points will need to be elaborated upon in more detail. Having clarity on the key rationales for a treaty, however, provides the basis for these discussions and enables those in the process to keep their eyes on the ball: to establish an international framework that articulates the binding legal obligations of business with respect to fundamental rights and develops effective enforcement mechanisms.

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[79] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

[80] They also suggest that the proposal of Deva, note 51 for a Declaration on the Human Rights Obligations of Business – whose exact normative force is unclear - would not be optimal except as an interim step if a more binding and expansive instrument cannot be agreed upon.